



# Staying Competitive and Compliant in the EU

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## Staying Competitive and Compliant in the EU

### *2010 Significant Developments and 2011 Prospects*

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## Staying Competitive and Compliant in the EU

This is the fifth in a series of webinars presented by Foley & Lardner LLP on important competition issues posed for companies doing business in the EU.

The first four presentations were held, respectively, on September 18, 2008, November 5, 2008, February 19, 2009 and January 19, 2010 and focused on the following topics: European Community and EU member state merger control policies, procedures, remedies, European competition law and procedures, including vertical restraints, technology licensing, cartel enforcement, trends and developments in European competition law, including privilege, private remedies, class actions and best practices for compliance.

The text and the audio of each of these preceding webinars is available on the Firm's website – [www.foley.com](http://www.foley.com). Click on services and then antitrust for access to these materials.



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## Staying Competitive and Compliant in the EU

### 2010 Developments and Prospects

- Attorney-client privilege
- Distribution : New vertical restraints block exemption
- New horizontal cooperation guidelines: standardization agreements, information exchange and research and development
- New Commission priorities
- Key Court of Justice decisions
- Private enforcement developments



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### Attorney Client Privilege

- AKZO NOBEL – 14 September 2010 Court of Justice decision
  - Upheld 2007 judgment by the General Court denying extension of legal professional privilege (LLP) to certain communications with in-house counsel
  - Confirms the very narrow scope of LLP in the EU
  - In-house lawyers - even if members of a national Bar – are viewed as economically dependent on their employer : do not enjoy same degree of independence as external lawyers
  - Two conditions for LLP protection : documents (1) created '*specifically and exclusively*' to seek legal advice from outside counsel on rights of defense and (2) prepared by "independent lawyers" not bound by a relationship of employment
  - Very important decision not only for European lawyers (whether in-house or not) but non-EU lawyers involved in EU law matters



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### Attorney Client Privilege (cont.)

- Refusal to extend LLP to in-house counsel communication delivered in the context of an EU cartel investigation
- However, likely to apply to all competition matters in the EU, such as mergers, distribution agreements
- may move to other areas of regulatory scrutiny in the EU



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### Distribution: New Vertical Restraints Legislation

- New Commission Regulation on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.  
[http://ec.europa.eu/competition/antitrust/legislation/regulation\\_verticals\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/regulation_verticals_en.pdf)  
Official Journal L 102, 23.4.2010, p.1-7
- New Commission notice: Guidelines on Vertical Restraints  
[http://ec.europa.eu/competition/antitrust/legislation/guidelines\\_vertical\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf)  
Official Journal C 130, 19.05.2010, p. 1



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### New Vertical Restraints Block Exemption (cont.)

- Effective on June 1, 2010
- Transition period until 31 May 2011
- Important issues:
  - Continuity with prior 1999 VRBE
  - Increase in large distribution market power
  - Role of internet on exclusivity
  - Re-enforce rule of reason approach
  - Role of national courts and counsel (in-house/out-house) after 2004 competition revolution
- Assess existing distribution arrangements, particularly if they have grown through acquisitions, look for potential problems and complainants



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### New Vertical Restraints Block Exemption (cont.)

- Key changes
  - 30% market share cap applies to both suppliers and distributors in all cases => increased compliance costs for distributors with significant market share
  - Further guidance on restrictions on online selling (considered as a passive form of selling)
  - Pro-competitive effects of RPM
  - One additional type of risk which is material in the determination of “genuine” agency agreement falling outside Article 101(1)
- New guidance on Upfront Access Payments and Category Management Agreements



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### New Rules on Horizontal Cooperation Agreements

- Commission Regulation No 1217/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of research and development agreements  
Official Journal L 335, 18.12.2010, p. 36
- Commission Regulation No 1218/2010 of 14 December 2010 on the application of Article 101(3) of the Treaty to categories of specialisation agreements  
Official Journal L 335, 18.12.2010, p. 43
- Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements  
Official Journal C 11, 14.01.2011, p. 1



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### New Rules on Horizontal Cooperation Agreements (cont.)

- BERs effective January 1st, 2011 - transition period of 2 years
- Guidelines effective January 14, 2011
- Important issues
  - New guidance on exchange of information between competitors
  - Better guidance for standardization agreements
  - R&D agreements : wider scope of BER
- New Horizontal Guidelines and Regulations can be found at:  
<http://ec.europa.eu/competition/antitrust/legislation/horizontal.html>



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### New Horizontal Cooperation Guidelines (cont.)

- R&D agreements remain the most favorably treated category of horizontal agreements : block exempted up to a 25% market share threshold
  - Scope extended to cover "paid for research"
  - Possibility for the parties to jointly exploit the results broadened
- Standardisation chapter
  - Safe Harbor regarding standard-setting process retained and more guidance on assessing agreements outside the safe-harbor.
- New chapter on information exchange
  - Exchanging individualized information regarding intended future prices or quantities considered restriction of competition by object
  - Guidance on assessing effects of information exchange and efficiencies



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### New Commission Priorities

- Little change in the Commission's priorities under Commissioner Almunia
- Continued emphasis on cartels enforcement (see statistics)
- Investigations on the energy sector continued with significant commitments offered by EDF, Svenska Kraftnet and EON Gas
- New Commission's focus on the ICT sector
- Transparency and predictability of proceedings : Best Practices in antitrust proceedings and in submission of economic evidence, hearing officer guidance (together the "Best Practices Papers" published on 6 January 2010)



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### Cartel Fines Imposed (not adjusted for Court judgments) - period 2006 - 2010

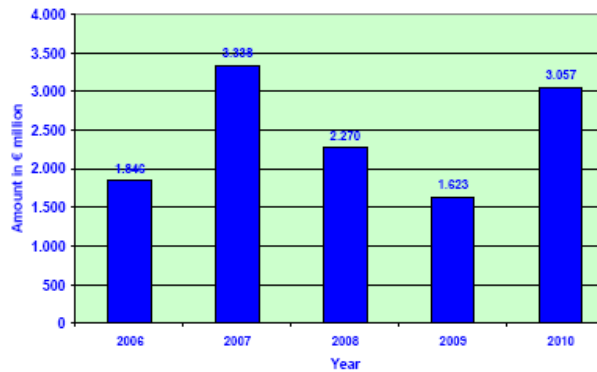
Last change: ++8 December 2010++

Year	Amount in €*
2006	1.846.385.500
2007**	3.338.427.700
2008***	2.270.012.900
2009	1.623.384.400
++2010****++	3.057.214.832
<b>total</b>	<b>12.135.425.332</b>

\* Amounts as imposed by the Commission and not adjusted for changes following judgments of the Courts (General Court and European Court of Justice) and only considering cartel infringements under Article 101 TFEU (previously Article 81 resp. Article 85 of the Treaty). Wherever prohibitions and fines concern infringements of Article 101 TFEU and of Article 102 TFEU (previously Articles 81 resp. 85 and Article 82 resp. 86 of the Treaty), only those amounts have been considered which concern the Article 101 TFEU infringements.



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<http://ec.europa.eu/competition>





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### New Commission Priorities (cont)

- First cartel settlement decisions
  - New settlement procedure introduced in 2008 where companies are entitled to a 10% reduction of their fines if admit liability to a cartel, accept the proposed fine and agree not to challenge the Commission's findings
  - *DRAM* cartel involving 10 producers of memory chips – 19 May 2010 / total fine of Euro 331,2 million
  - *Animal Feed Phosphates* cartel involving 13 companies – 20 July 2010 / total fine of Euro 175,6 million / 'hybrid' settlement as 1 company withdrew from the settlement procedure



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### New Commission Priorities (cont)

- Inability to pay
    - Increased use of the inability to pay provision included in the Commission's fining guidelines
    - *Bathroom fittings and fixtures* cartel : reduction of the fines of 5 companies
    - *Animal Phosphates* cartel : one company obtained a 70% fine reduction
    - *Air Freight* cartel : unsuccessful attempt of the companies to obtain a reduction of their fines
- => Fine reduction for inability to pay remain the exception and strict application of relevant applicable conditions



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### New Commission Priorities (cont)

- Energy sector: significant commitments offered in no less than 4 cases - Svenska Kraftnet, EDF, E.ON Gas, and ENI - ending the practices alleged to be abusive
- New attention given to the ICT sector:
  - on-going investigation of Google for alleged abuse of its dominance in the online search market
  - investigation of IBM for alleged abuse of dominance on the market for mainframe computers.



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### Important Court Decisions (Art 101)

- Several fine reductions granted by the General Court in *Industrial thread* cartel, the *Water, heating and gas tubes* cartel, the *Raw Tobacco* cartel and the *Industrial sacks* cartel
- Appeals before the Court of Justice of Commission's decision of 2002 on price fixing in plasterboard market
  - by Lafarge : no reduction obtained of its Euro 249 million fine – 50% increase applied by the Commission as a result of Lafarge's previous infringement of the competition rules maintained (17 June 2010)
  - by Knauf Gips KG: confirmed to be held liable for the actions of its subsidiaries despite the lack of subordinating legal links between these entities => legal structure not decisive where that structure does not reflect the effective functioning and actual organization of the group (1 July 2010)



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### Important Court Decisions (Art. 102)

- 2005 Astra Zeneca decision upheld – 1 July 2010
  - Misleading information provided to patent authorities to obtain supplementary protection certificates for its Losec product = > duty of good faith or honesty for dominant companies : need to take action necessary to rectify the error if made non deliberately
  - Withdrawal of marketing registration for an older version of Losec viewed by the Court as obstructing / delaying the market entry of generic products in absence of objective justification = > implications of this ruling beyond the pharmaceutical sector : dominant companies cannot use regulatory procedures to prevent competitors from entering the market if not justified by the need to protect its own commercial interests
- Deutsche Telekom – 14 October 2010
  - Margin squeeze viewed as a standalone abuse of a dominant position
  - « as-efficient competitor » test applied for determining exclusionary conduct



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### Important Court Decisions (Art 101) (cont.): Reminder of Significant Recent Precedents

- Liability Thresholds:
  - *T-Mobile*: ECJ (June 4, 2009) lowers threshold of liability
  - single meeting can result in liability under §101(1)
  - Issue is whether exchange of competitive information is capable of reducing uncertainty about future market conduct/presence of market effects only relevant for purposes of damage analysis/burden on actors to prove competition not affected
- Internal Market Restraints:
  - *Glaxo Smith Kline* ECJ (October 9, 2009)
  - Art 101 (3) exemptions possible for dual pricing/export restrictions
  - OK if pro-competitive benefits, particularly innovations



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### Important Court Decisions (Art 101) (cont.): Reminder of Significant Recent Precedents

- Parental Responsibility: It's 10 pm, where are your children?
  - *Erste Bank (Lombard Club)* (ECJ) September 21, 2009: normally liability for cartel activity committed by a sub does not follow to parent that subsequently acquires it. According to ECJ, either former or new parent can be liable
  - *Akzo Nobel (ECJ)* (September 10, 2009)
  - Parent liable for antitrust violations of wholly-owned sub with prima facie assumption of decisive influence being exercised from 100% ownership – can be rebutted by proof that sub acted independently on issues of pricing production, margins, etc.



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### Private Enforcement Developments

- Limited developments as private enforcement raises many issues, concerns and fears which are unlikely to be resolved in the near future.
- Rules of evidence
- Rules of discovery
- Rules regarding damages
- Role of national courts
- Risk taking and game theory
- Role of EU institutions (e.g., Court of Justice, General Court, Commission) as drivers of consistent application of law (and procedures?)